VET.APP. No. 15-1704

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

WALTER G. SHEPPARD,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

RICHARD A. DALEY
Deputy Chief Counsel

YVETTE R. WHITE
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027E)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-5989

Attorneys for Appellee

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I. ISSUES PRESENTED

1. **Whether the Court should remand the Board of Veterans' Appeals (Board) decision of November 14, 2014, which denied Appellant's claims of (1) whether new and material evidence has been received to reopen claims for entitlement to service connection for hallux valgus of the (a) right foot and (b) left foot; (2) entitlement to service connection for (a) reactive airway disease, (b) sleep apnea, (c) a right leg condition, and (d) a left leg condition.**

2. **Whether the Court should affirm the Board's decision of November 14, 2104, which denied Appellant's claim of entitlement to service connection for headaches.**

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Walter G. Sheppard, appeals a November 19, 2014, decision of the Board that denied his claims of (1) whether new and material evidence has been received to reopen claims for entitlement to service connection for hallux valgus of the (a) right foot and (b) left foot; and (2) entitlement to service connection for (a) reactive airway disease, (b) sleep apnea, (c) a right leg condition, (d) a left leg condition, and (e) headaches. (Record Before the Agency (R.) 5-27).

The Board also remanded the issues of entitlement to (1) service connection for (a) bilateral hearing loss; (b) degenerative disc disease of the lumbar spine, to include as secondary to post-traumatic stress disorder (PTSD); (c) right and left lower extremity peripheral neuropathy, to include as secondary to hypertension and diabetes mellitus (DM), type 2; and (2) a compensable rating for calcaneal spurs of the right and the left foot. Because a remand is not a final Board decision subject to judicial review, the Court lacks jurisdiction to consider these issues at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

Also, the Board awarded service connection for DM. This is a favorable finding and should not be disturbed. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

On appeal, Appellant variously asserts that the Board did not provide an adequate statement of reasons or bases for its determinations by not discussing relevant evidence of record and pertinent laws. (Appellant's Informal Brief (AIB) at 1-22). As to be explained below, remand is warranted to appropriately address Appellant's claim, except as to his claim for entitlement to service connection for headaches, where he has not carried his burden of persuasion. Thus, the Court should affirm this part of the Board's decision.

C. Statement of Facts

Appellant had active service from June 1979 to April 1992 (R. at 4209) and February 2003 to January 2004. (R. at 4210). In April 1992, Appellant submitted a claim for entitlement to service connection for his foot disability. (R. at 7099-7206). His service medical records (SMRs) are of record. (R. at 2137-2230, 2235-2475, 3856, 3864-90, 5338-5364, 5373-77, 5508-5528, 5746-80, 5934-35, 6084). Appellant presented to a VA general medical examination in July 1992, wherein he was diagnosed with "bilateral hallux valgus, mildly symptomatic." (R. at 6064 (6023-24, 6058-64)). Appellant's claim was denied in a January 1993 rating decision because it was considered congenital or developmental. (R. at 6028-29).

In February 2008, Appellant submitted claims for entitlement to service connection for, *inter alia*, shortness of breath, soreness of legs, and sleeping difficulty, which included snoring. (R. at 5908). To support his claim, Appellant submitted a post-deployment health reassessment in May 2008. (R. at 5855-61 (5846-65)). Appellant in February 2009 presented to a VA Gulf War guidelines examination. (R. at 5608-42). The next month, Appellant filed additional claims for entitlement to service connection for, *inter alia*, a respiratory condition due to exposure to chemicals in the Gulf War. (R. at 5587-90). In April 2009, Appellant also filed claims for entitlement to service connection for burning and pain of his right and left leg, sleep apnea, a breathing problem related to burning in the chest, and a claim related to his foot condition. (R. at 5585-86).

VA, in April 2009, informed Appellant that his service-connection claims were denied, but deferred its response on Appellant's claims to reopen his previously denied claims for entitlement to service connection for hallux valgus of the left and right foot. (R. at 7758-82). Thereafter, in June 2009, VA denied Appellant's claims to reopen his previously denied claims for entitlement to service connection for hallux valgus of the left and right foot. (R. at 7732-57). In June 2009, VA received Appellant's notice of disagreement (NOD). (R. at 5264-66). Appellant presented testimony in May 2010. (R. at 5143-5157). Appellant was evaluated for his feet by Martin T. Girling, D.P.M. in June 2010. (R. at 5181-88). In July 2010, a statement of the case (SOC) issued. (R. at 5063-5141). VA received progress notes in September 2010. (R. at 6747-7711). Additionally

during this month, VA received a VA Form 9 from Appellant along with medical evidence. (R. at 5028-5061). Appellant requested that VA reopen his claim for entitlement to service connection for a foot condition and a respiratory condition. (R. at 4947-48).

A Supplemental SOC (SSOC) issued in August 2011 (R. at 4836-69), the same month that VA received another VA Form 9 from Appellant. (R. at 4826-30). VA, in August 2011, was notified that Appellant was diagnosed with long-standing allergic rhinitis and obstructive sleep apnea. (R. at 4021). During this month, VA also received additional progress notes. (R. at 4821-25, 4872-931). A podiatry attending note dated in August 2011 reflects that Appellant was diagnosed with plantar fasciitis. (R.at 5533-34). VA, in September 2011, updated U.S. Senator Bill Nelson on Appellant's claims. (R. at 7715-16); *see also* (R. at 4204-08)).

VA received more progress notes in September 2011. (R. at 4788-800). Thereafter, in December 2011, Appellant requested that VA reopen his previously denied claims of entitlement to service connection for sleep apnea and hallux valgus. (R. at 4720-21). Along with his request, Appellant submitted more medical evidence from dr. Girling, wherein Dr. Girling stated that Appellant had painful flat feet, which Appellant stated occurred "from his duties in the US Military (no one specific injury)." (R. at 4736 (4727-739)). Appellant's wife in February 2012 submitted a statement that her husband had sleep apnea after he returned from the war. (R. at 4594 (4590-96)). Appellant presented to a VA

flatfoot examination in June 2012 and was diagnosed with hallux valgus. (R. at 4529 (4528-37)). Appellant noted in the examination that his bilateral pes planus started during active duty. (R. at 4539 (4528-37)). VA received yet more progress notes in July 2012 (R. at 6213-6657), and in August 2012. (R. at 6727-46). In an August 2012 rating decision, VA granted Appellant entitlement to service connection for sinusitis, noting in its decision that his disability was rated as 50 percent due to "[n]ear constant sinusitis characterized by: [h]eadaches[,] [p]ain[, and] [t]enderness." (R. at 4417 (4410-27)).

Appellant presented to a Gulf War examination in April 2013 (R. at 4078-83), and he submitted further medical evidence in August 2013 to support his claim. (R. at 4001-4044). In September 2013, he submitted a statement, wherein he stated that he was filing a letter of disagreement (R. at 3700 (3700-3825)), along with a statement wherein he stated that his hallux valgus was not a congenital disorder because he did not have it when he entered the service. (R. at 3705-06, 3820-21). He also submitted another statement with his NOD, wherein he stated that his sleep apnea was due to his tour of duty in the Gulf War (R. at 3753-54), as was his reactive airway disease. (R. at 3710); *see also* (R. at 2698-99, 2709). In November 2013, Appellant submitted a request to reopen his previously denied claims of entitlement to service connection for sleep apnea and hallux valgus. (R. at 2673-74).

In March 2014, VA received a statement from Appellant raising administrative error as to its decision to deny his claim for entitlement to service

connection for hallux valgus. (R. at 2583 (2582-2583)). An August 2014 rating decision denied Appellant's claims. (R. at 1968-2079). Appellant presented to a VA foot conditions, including flatfoot (pes planus), examination in July 2014, where he was diagnosed with hallux valgus and tinea pedis. (R. at 1895-1903, 957-64). Appellant testified at a hearing before a Veterans Law Judge in August 2014. (R. at 1904-56). VA received evidence from Appellant in September 2014. (R. at 1701-59, 1800-83). Appellant submitted another NOD in October 2014. (R. at 1693).

On November 19, 2014, the Board made a decision on Appellant's claims at issue. (R. at 5-27). Appellant filed an appeal of this decision.

III. SUMMARY OF THE ARGUMENT

The Court should remand the Board's decisions as it pertains to Appellant's claims of (1) whether new and material evidence has been received to reopen claims for entitlement to service connection for hallux valgus of the (a) right foot and (b) left foot; and (2) entitlement to service connection for (a) reactive airway disease, (b) sleep apnea, (c) a right leg condition, and (d) a left leg condition because it has failed to provide an adequate statement of reasons or bases for its determination.

Appellant has failed to carry his burden of persuasion and demonstrate that the Board erred in its determination that Appellant should be separately awarded entitlement to service connection for headaches. Thus, the Court should affirm the Board's decision.

IV. ARGUMENT

A. The Court should remand the enumerated issues above because the BoarD has provided an inadequate statement of reasons or bases for its determinations.

1. Hallux Valgus

At the outset, Appellant's brief is confusing, but it is clear that he believes that the Board erred in its decision. Given such, the Secretary acknowledges that "[a] liberal and sympathetic reading of appeal submissions is necessary" for *pro se* veterans. *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009). To this extent, it appears that Appellant asserts that nothing within the record demonstrates that his hallux valgus, which claim was initially denied in a January 1993 rating decision (R. at 6028-29), is a congenital or developmental disorder.[1] AIB at 3-4. To support this assertion, Appellant has submitted copies of SMRs, which include his induction examination and his separation examination to demonstrate that there was no congenital or developmental disorder. *See* (R. at 3864-90). The Board, however, has not addressed in its terse discussion of the matter whether Appellant's lay statements are new and material evidence. In fact, upon review of the Board's discussion as it relates to Appellant's claim, the Board fails to sufficiently explain how it has arrived at its conclusion that new and material evidence has not been submitted. *See* (R. at 10-11 (5-27)).

[1] While the Board does not provide any analysis as to whether the hallux valgus, which the Regional Office characterized as a "congenital or developmental abnormality," was either a defect or disease, the Secretary is mindful of the legal significance of the distinction. *Quirin v. Shinseki*, 22 Vet.App. 390, 394-95 (2009).

For instance, the Board stated that Appellant's claim was originally "denied in January 1993 because the condition was not caused or aggravated by active service." (R. at 10 (5-27)). In actuality, the Board's statement is inconsistent with the record, where the January 1992 rating decision stated that his claim was denied "because [Appellant's disorder of the feet] is a congenital or developmental abnormality and it was not aggravated in service." (R. at 6029 (6028-29)). Given that the Board has incorrectly determined why Appellant's claim was denied in 1993, it would be unable to assess whether any evidence submitted would be sufficient to reopen Appellant's claim. Furthermore, lay evidence can be new and material evidence and the Board has not addressed Appellant's lay evidence in its decision. For the purposes of a claim to reopen, the credibility of the newly submitted evidence, including **lay evidence**, is generally presumed. *Justus v. Principi,* 3 Vet.App. 510, 513 (1992) (noting that the presumption of credibility "is made *only for the purpose of determining whether the case should be reopened* "). Only *after* "evidence is found to be new and material and the case is reopened" should the Board decide the ultimate credibility or weight to be accorded to that evidence. *Id.* Based on the aforementioned inadequate statement of reasons or bases, remand is warranted for the Board to consider Appellant's lay statements and to reconcile its findings. *See Gilbert v. Derwinski*, 1 Vet.App. 49 (1990).

Additionally, it appears that Appellant argues that there is clear and unmistakable error (CUE) in the prior adjudication of his claim. AIB at 7. Upon

review of Appellant's testimony in August 2014, Appellant asserts that there is CUE in the prior adjudication of his claim (R. at 1944 (1904-56)); however, it does not appear that VA has acknowledged such a motion. Given such, remand is warranted for the Board to address whether such issue was reasonably raised. *See Moody v. Principi,* 360 F.3d 1306, 1310 (Fed. Cir. 2004) (stating that whether an informal claim for secondary service connection was made "is essentially a factual inquiry"); *Robinson v. Peake,* 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki,* 557 F.3d 1355 (Fed. Cir. 2009); *Beverly v. Nicholson,* 19 Vet.App. 394, 405 (2005) ("[F]actual determinations regarding whether the appellant's submissions and arguments reasonably raised an informal claim ... are best for the Board to make in the first instance, and therefore, we conclude that it is premature for the Court to address this matter."); *see also Tucker v. West,* 11 Vet.App. 369, 374 (1998) (holding that remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy").

2. Bilateral Leg Condition

Appellant argues that the Board did not discuss whether he was entitled to service connection for his disability of the legs based on the presumption provided under 38 U.S.C. § 3.117. The Secretary agrees that remand is warranted for the Board to discuss this theory of service connection, especially where Appellant expressly raised this issue in his August 2014 Board hearing.

See (R. at 1914 (1904-1944)). The Board is charged with addressing all reasonably raised issues. *See Robinson v. Peake,* 21 Vet.App. at 553. It did not do so; thus, remand is warranted. *See Tucker*, 11 Vet.App. at 374.

3. Sleep Apnea

Appellant asserts that he is a combat Veteran and that the Board did not apply the evidentiary provisions of 38 U.S.C. § 1154 to his claim for entitlement to service connection for sleep apnea. AIB at 15. Section 1154(b) allows a combat veteran to use "satisfactory lay or other evidence" to establish that he was injured or incurred a disability while on active duty, even in cases where "there is no official record" that such injury or disability occurred. 38 U.S.C. § 1154(b). Appellant testified in August 2014 that, while he was in service, he started having breathing problems. (R. at 1938 (1904-1956)).

Specifically, Appellant relates his sleep disturbance to his time in the Persian Gulf. (R. at 1938). However, upon review of the Board's decision (R. at 16-27 (5-27)), it did not assess Appellant's lay statement or apply the laws as they pertain to combat veterans. Given that the Board denied his claim due to the lack of in-service evidence, the Board should have discussed whether the provisions of 38 U.S.C. §1154(b) applied to his claim. It did not do so; thus, remand is warranted for the Board to apply this law. *Tucker*.

Additionally, it does not appear that the Board discussed Appellant's wife's lay statement that was submitted in September 2013as it pertained to his sleep apnea, wherein she stated that Appellant had sleeping difficulties after his return

from the war. *See* (R. at 3088). The Board has a duty to discuss relevant evidence of record as well as pertinent laws. *See Washington v. Nicholson,* 19 Vet.App. 362, 367–68 (2005). It did not do so here; thus, remand is warranted. As an aside, the Board weighed evidence of Appellant's September 1992 separation examination against Appellant's claim. (R. at 17 (5-27)). However, it appears that Appellant is claiming sleep apnea from his second period of service. Given such, upon remand the Board's should reconcile its findings.

4. Reactive Airways

Appellant asserts that his claim for entitlement to service connection for reactive airways is related to his service time in Kuwait during Operation Iraqi Freedom. AIB at 19. Notably, the Board has acknowledged in its decision, based on Appellant's DD-214, that Appellant served in Kuwait from February 2003 through December 2003. (R. at 13 (5-27)). However, upon review of the Board's decision, it weighs statements provided in Appellant's separation examination in 1992, which is prior to his time in Kuwait, against his claim. The Board's finding as such cannot be reconciled with the evidence.

Furthermore, Appellant has consistently stated that he is entitled to the Gulf War presumption of 38 U.S.C. § 1117(b) because his reactive airways disorder is an undiagnosed disorder. In fact, in the August 2014 hearing, he testified to such. (R. at 1922 (1904-55)). The Board determined that he was not entitled to the benefit of such provision because Appellant's condition was

attributed to known clinical diagnoses. (R. at 13 (5-27)). This finding is not consistent with the evidence of record.[2] Indeed, the Board acknowledged in its decision that a February 2009 respiratory examination "diagnosed reactive airway disease with an unknown etiology." (R. at 15 (5-27)).

Under 38 U.S.C. § 1117, a Persian Gulf veteran who "exhibits objective indications of a qualifying chronic disability" is entitled to compensation on a presumptive basis if that disability (1) manifests during service on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War, **OR** to a degree of 10% or more before December 31, 2016, and (2) "[b]y history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnoses." 38 C.F.R. § 3.317(a)(1)(i), (ii) (2015); *see* 38 U.S.C. § 1117 (authorizing Secretary to prescribe regulations to compensate Persian Gulf War veterans) (emphasis added). Given the Board's acknowledgement, remand is warranted for the Board to reconcile its findings and determine if Appellant is entitled to service connection for restrictive airway under 38 U.S.C. § 1117.

Appellant appears to have raised other arguments in his informal brief as it pertains to his claims for entitlement to service connection for bilateral leg conditions, sleep apnea, and reactive airway disease, as well as whether his claims for entitlement to service connection for hallux valgus should be

[2] Also, the mere fact that a manifestation of disability is attributable to a known diagnosis is not necessarily dispositive. 38 C.F.R. § 3.317(a)(2)(ii).

reopened,[3] which, if valid, would result in a remedy no greater than remand. Given that the Secretary agrees that remand is warranted, Appellant would be free to raise these issues on remand. *See Best v. Principi,* 15 Vet.App. 18, 20 (2001) (per curiam order) ("A narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him."). The Court thus need not address them.

B. The Court should affirm the Board's determination that Appellant is not entitled to service connection for headaches where he has not demonstrated the Board committed prejudicial error.

Appellant asserts that the Board erred in determining that he was not entitled to service connection for headaches. AIB at 10-11. He maintains that his headaches were caused by Gulf War Syndrome and that he is entitled to the presumption under 38 U.S.C. § 1117(b). AIB at 10. The Court, however, should not be persuaded by this argument because the Board appropriately determined that Appellant's headaches were not entitled to the presumption of 38 U.S.C. § 1117(b) because his headaches were attributed to a known clinical diagnosis, perennial allergic rhinitis. (R. at 13-14 (5-27)). Indeed, in his informal brief, Appellant notes the possibility that his headaches were attributable to such. AIB at 11.

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[3]The Board shall incorporate copies of Appellant's Informal Brief into Appellant's file for consideration in future decisions on this matter.

To warrant compensation due to an undiagnosed illness pursuant to section 1117(a)(2), the Federal Circuit recently clarified that what is required is "only that the veteran has been evaluated and no diagnosis could be made concerning the cause of the qualifying chronic disability," and not that the veteran be "'diagnosed' with an 'undiagnosed illness' after all possible medical conditions have been ruled out." *Joyner v. McDonald*, 766 F.3d 1393, 1395 (Fed. Cir. 2014). Appellant has not presented evidence to demonstrate that he meets the aforementioned criteria. Thus, the Court should affirm the Board's decision.

Moreover, the Board also evaluated whether there was any evidence of record that would allow for direct service connection of Appellant's headaches. *See* (R. at 14 (5-27)). The Board determined that no such evidence existed. The Board noted that, besides headaches, which are contemplated by his service-connected sinusitis (*see* (R. at 4417 (4416-18, 4422-27))), *see also* 38 C.F.R. § 4.97 Diagnostic Code (DC) 6513, there is no competent evidence to show that Appellant's service-connected PTSD, hypertension, or fibromyalgia caused or permanently worsened his headaches.

Indeed, Appellant's argument is that the medical examinations of February 2009 and June 2012, that provided evidence to rate his sinusitis are inadequate (AIB at 11), but he has submitted no evidence to demonstrate that his disability stands alone and is not part of his service-connected sinusitis. Essentially, saying it is so does not make it so. *See Stolt-Nielson S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 675 n7 (2010) ("[M]erely saying something is

so does not make it so."); *see also Kern v. Brown,* 4 Vet.App. 350, 353 (1993) ("Moreover, appellant's *attorney* is not qualified to provide an explanation of the significance of the clinical evidence." (emphasis added)). Moreover, even in light of Appellant's pro se status, the Court should not address this argument, especially where Appellant is presenting vague assertions without any support for his contention. *See Woehlaert v. Nicholson,* 21 Vet.App. 456, 463 (2007) ("This Court has consistently held that it will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief."). Thus, the Court should affirm the Board's decision.

V. CONCLUSION

In view of the foregoing, the Secretary respectfully requests that the Court, as to the Board's November 2014 decision, in part, remand Appellant's claims for (1) whether new and material evidence submitted is sufficient to reopen a previously denied claim for entitlement to service connection for hallux valgus of the (a) left, and (b) right foot; and (2) entitlement to service connection for (a) bilateral leg disability, (b) sleep apnea, and (c) reactive disease; and, in part, affirm the Board's denial of Appellant's claim for entitlement to service connection for headaches.

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Richard A. Daley
RICHARD A. DALEY
Deputy Chief Counsel

/s/ Yvette R. White
YVETTE R. WHITE
Appellate Attorney
Office of the General Counsel (027E)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-5989
Counsel for the Secretary

CERTIFICATE OF SERVICE

On an August 4, 2016, a copy of the foregoing was mailed postage prepaid to:

Walter G. Sheppard
1027 Fairwinds Circle, Apt. 108
Plant City, FL 33563

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Yvette R. White
YVETTE R. WHITE
Counsel for Appellee